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Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

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No. 47.

ANNA R. KEAN ET AL., PLAINTIFFS IN ERROR,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF INDIANA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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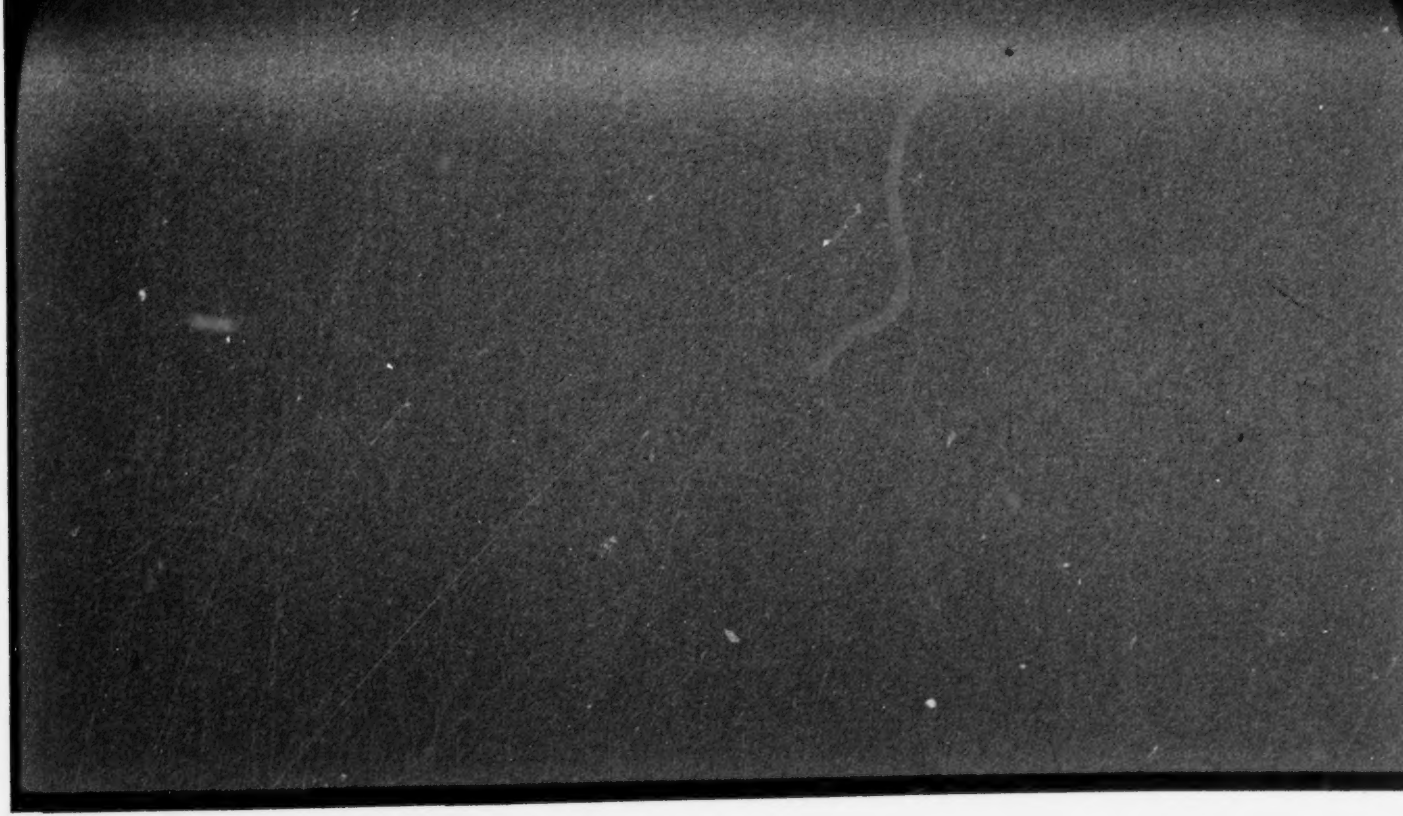

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Brief and Argument for Defendant in Error.

STATEMENT.

MAY IT PLEASE THE COURT:

This action was brought by the defendant in error under section 1070, Horner's Annotated Statutes of Indiana, which is as follows:

"An action may be brought by any person, either in or out of possession, or by one having an interest in remainder or reversion, against another who claims title to, or interest in, real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title."

There is included in the complaint a large number of acres of land owned by the defendant in error, the title to which is in no way involved in this controversy and in which the plaintiffs in error disclaim any interest whatever.

The questions presented in this court are so concisely stated in the opinion rendered by the supreme court of Indiana in the case (150 Indiana, 699) that we will adopt that opinion as our statement here. It is as follows:

"This was an action brought by appellee against appellants and others to quiet title to certain real estate described in the complaint, and situated in S. ½ section 18, and section 19, township 37 N., range 9 W.; and in sections 12, 13 and 24, township 37 N., range 10 W., in Lake county. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States under the swamp-land act of 1850, and by the descriptions of the Government survey of 1834. By the same descriptions the lands were conveyed by the State to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf lake and the bed of Lake George, but since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.

"In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey and the sales made in pursuance thereof that appellants claim title.

"The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean vs. Roby*, 145 Ind., 221; 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and consequently that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

"The second contention is that the action is barred by the fifteen and twenty years' statute of limitations. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to

title as we have seen there was none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original Government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley vs. Burbanks*, 146 Ind., 534, 45 N. E., 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, or mining claim, a non-navigable lake, a prairie or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy."

The opinion of the supreme court of Indiana in the case of Kean *vs.* Roby, above referred to and reported in 145 Indiana, 221, is as follows:

"This was an action to quiet title to real estate, brought by the appellee Sophia Conklin against the appellant and other defendants made appellees on this appeal. Various answers and cross-complaints were filed by the appellant and by other defendants, and the cause was submitted to the court for trial, resulting in a finding and decree against plaintiff.

"A new trial having been granted as of right under the statute, the cause was resubmitted to the court for trial upon the pleadings in the first trial. There was a special finding of facts on this second trial, with conclusions of law, and a decree against the plaintiff and also against the appellant and others, and in favor of certain of the appellees; and the appellant, as also the plaintiff and others named,

were enjoined from setting up or asserting any claims or title to the land in question.

"Many alleged errors are assigned by the appellant, most of which are irregular, and could be considered only as reasons for a new trial. Neither party, however, has given special attention to the assignment of errors, both preferring to discuss the controlling facts and the law in relation thereto.

"The land in controversy is situated in Lake county, in the extreme northwest corner of the State. It is described in the complaint as: 'Lot number 5 in section 36, T. 38 N.; lots 8, 9 and 10 in section 1, T. 37 N., and lots 5, 6, 7 and 8 in section 12, T. 37 N., all in range 10 W., Lake county, Indiana, and containing 252.5 acres more or less.'

"The appellant in her cross-complaint made claim to the same land, 'in plaintiff's complaint described,' and asked that her title thereto be quieted as against the plaintiff and all of her codefendants; and that they be enjoined from setting up any claim thereto.

"The appellees, who are in possession of the lands in controversy, claim title under the original Government survey, by virtue of patents from the United States to the State of Indiana, and from the State to their remote grantors.

"Townships 38 and 37 north, range 10 west, in which the lands are situated, were originally surveyed in 1834, under authority of the United States Land Department, as shown by the field-notes and plats made a part of the record. These townships are both fractional, lying next to the State line dividing Indiana from Illinois, and are in part covered by a body of water known as Wolf lake.

"The appellees claim that title to all of these lands passed from the General Government to the State of Indiana by the swamp-land act of September 28, 1850, subject only to identification and selection by the State and approval thereof by the Secretary of the Interior. The patent from the United States to the State is dated March 24, 1853. In this patent it is recited that 'the United States of America, in consideration of the premises and in conformity with the act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said State of Indiana, in fee-simple, subject to the disposal of the legislature thereof, the tracts of land above described.' The tracts so described

include: 'The whole of fractional sections one, twelve, * * * all in township thirty-seven north, of range ten west, * * * also the whole of fractional section thirty-six, in township thirty-eight north, of range ten west.' The court found the title thus traced by appellees to be good, and held that they were entitled to continue in possession of the lands in dispute.

"The appellant contends that the bed of Wolf lake, covering a part of the above-described sections, as aforesaid, was not surveyed in the original survey of 1834, and shows that on representations to that effect, made to the Land Department of the United States, the Commissioner of the General Land Office ordered a resurvey of the land within the meander lines of the lake, which resurvey was made in 1875. Appellant then claims that on such resurvey by the Land Department the lots in the lake bed became subject to entry and sale, and subject also to the right of appellant's remote grantors to locate 'Sioux half-breed scrip' thereon; and she traces her title from patents issued for said lots to such remote grantors on such location of half-breed scrip.

"Appellees, on the other hand, contend that all said fractional sections, including the bed of the lake, were surveyed in 1834, and the lands and lots sold by the United States under such survey, so that, rightfully, the Government had no such land to survey or sell when the order for the survey of 1875 was made and the lands in question attempted to be resold by the Land Department.

"As the appellant must succeed, if at all, on the strength of her own title, it will be sufficient to decide the contention here made. If the lands in controversy were, in fact, surveyed in 1834, and sold by the United States under such survey, then it is clear enough that the Government had no authority or power to resurvey the lands in 1875, or to sell them over again, and appellant's title must wholly fail.

"The annexed plats show the original survey in 1834 of section thirty-six in township 38, and of sections one and twelve in township thirty-seven; and also the resurvey in 1875 of that part of the bed of Wolf lake, in the same townships and sections, being all that is necessary to indicate the location of the lands in dispute:

"We are of opinion that in the original survey of 1834

both townships in question and all of the sections were fully surveyed, including the bed of Wolf lake.

"The plat, with the chains marked thereon, show that the townships were both fractional. Township 38 consists only of fractional section 36, lying between the Illinois line and Lake Michigan. Township 37 is less than a mile in width, extending from the east township line west to the State line. The field-notes show that the east section line, and also the west line, being the State line, were actually run; and that the section corners on said east section line of sections 1 and 12 were marked. The field-notes also show that the east and west line between townships 38 and 37, being the north line of section 1, T. 37, was actually run, except a short distance in the northeast corner, which extends into Lake Michigan; also that the east and west section line between sections 1 and 12, T. 37, was run; also that the east and west section line on the south side of section 12, T. 37, was run from the southeast corner of said section west to the lake, this line not being extended in the field across to the State line, or west line of the section. The field-notes further show, as does the plat, that all the interior lines of section 36, in T. 38, and the greater part of those in sections 1 and 12, in T. 37, were actually run and the corners marked in the field.

"Under provisions of sections 2395 and 2396, U. S. R. S., the foregoing was a sufficient survey of the townships and sections named. By section 2395, R. S., *supra*, it is made a sufficient survey to run 'each way, parallel lines at the end of every two miles and by taking a corner on each of such lines at the end of every mile.' In the foregoing survey the east and west section lines, as actually run (are less than a mile apart. All the lines, interior and exterior, of section 36, T. 38, are actually run). So also are all the lines, interior and exterior, of section 1, T. 37. For section 12, T. 37, the north line is actually run.

"There remains only the south line of said section 12, a part only of which is run. For this defect, if it should be considered such, section 2396, U. S. R. S., *supra*, provides as follows:

"'The boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships

where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township.' Following this direction, the south line of section 12 will be found by 'running from the established corner,' at the southeast corner of said section, a 'due east and west line, west to the State line, being the west external boundary of such fractional township.'

"It appears, therefore, that township 37, as well as township 38, was fully surveyed in the original survey of 1834; that the lines of the survey extend over both land and water, and that the United States conveyed to the State the fractional townships so surveyed.

"It follows that all the territory in question in the two townships, including that covered by Wolf lake, as well as the comparatively dry land on its borders, having passed to the State from the ownership of the United States by the swamp-land act of 1850, and the patents issued to the State therefor in 1853, no land in said sections remained, whether under Wolf lake or elsewhere, which could be resurveyed or resold by the General Government. The survey of 1875 and the sales thereunder were nullities. Appellant, therefore, has no title to the lands claimed by her. See *Tolleston Club vs. State*, 141 Ind., 197, where a similar question is considered and a like decision reached.

"Two objections made to this conclusion may be noticed:

"First, it is said that the validity of the resurvey of 1875 having been affirmed by the United States Land Department, which Department had full jurisdiction of the matter, the question is not reviewable in the courts. It is true, as said in *Hardin vs. Jordan*, 140 U. S., 371, that the decisions of the Land Department on matters of fact within its jurisdiction made in the course of administration, cannot be called in question collaterally.

"But, as said in the same case by the Supreme Court of the United States: 'If the lands patented were not at the time public property, *having been previously disposed of* * * * the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void. See also *Mitchell vs. Smale*, 140 U. S., 406.

"The other objection made is, that in the Beaver Lake

case, the *State vs. Portsmouth Savings Bank*, 106 Ind., 435, this court decided that the sale of the border lots on Beaver lake, under the original Government survey, did not carry title to the lands covered by the waters of the lake. The case is not in point for the very good reason that in the Beaver Lake case the lands under the lake were not surveyed; the survey ceased at the borders of the lake. In the case of Wolf lake, however, as we have seen, the lake itself was included in the survey; the section lines passed over and included the waters as well as the land. Had Beaver lake been actually surveyed, as Wolf lake was, the matter would be different; as it is that case is not in point. The case at bar is ruled by the Tolleston Club case, *supra*."

So far as the title to the property in which the plaintiffs in error claim an interest is concerned, it was unnecessary for the defendant in error to have commenced this or any other action, for, we respectfully submit, this court has, in the cases of *Hardin vs. Jordan* and *Mitchell vs. Smale*, reported in 140 U. S., at pages 371 and 406, respectively, conclusively settled in favor of the defendant in error all questions respecting that title which have been or could be raised by plaintiffs in error. Inasmuch, however, as counsel for plaintiffs in error has in his brief filed herein attempted to re-argue practically the same questions decided in the *Hardin* and *Mitchell* cases, we will first attempt to show that there is in this record no new question for this court to pass upon.

BRIEF.

Plaintiffs in error claim, *first*, that their title to the lands above described in the beds of Wolf lake and Lake George, claimed to have been acquired by them under the resurvey of said lands in 1875, is superior to the title of defendant in error, based upon the original survey of 1834; and, *second*, that this action of defendant in error is barred by the statute of limitations.

I.

HARDIN *vs.* JORDAN AND MITCHELL *vs.* SMALE CONTROL THIS CASE.

Both of these cases involved the title to land on the margin of and under the waters of Wolf lake, the same as in the case at bar. They differ from the case at bar only in that the land there in controversy was within the boundaries of the State of Illinois and just across the line from the land now in question, in the State of Indiana. The only distinction, therefore, between these cases and the case at bar is the difference between the laws of the States of Illinois and Indiana respecting the rights of parties owning land bordering on inland lakes.

In passing upon the questions raised by the plaintiffs in error it may be helpful to the court if we here print somewhat at length from the opinions in the *Hardin* and *Mitchell* cases.

In Hardin *vs.* Jordan, at page 379 of the opinion, the court said:

"We are called upon to decide whether the title of the plaintiff, under the patent granted to her ancestor in 1841, extended beyond the limits of the actual survey, under the permanent waters of the lake in front of the land described in the patent, and not merely to the line of low-water mark,

as held by the court below. It will be observed that the Government surveys made in 1834–'5 upon which the patent was issued, not only laid down a meander line next to the lake, but also described said lines as running 'along the margin of the lake;' and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words 'navigable lake,' although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh-water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.

"Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the State, extending either to the margin or center of the stream, according to the rules of that law. It has been the practice of the Government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary. (Citing Railroad Co. *vs.* Schurmeir, 7 Wall., 272, and other cases.) Mr. Justice

Clifford in the case first cited says: 'Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water-course, and not the meander line, as actually run on the land, is the boundary.' It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters. * * *

"In the case of Barney *vs.* Keokuk, 94 U. S., 324, we held that it is for the several States themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the State of Iowa with regard to land on the banks of the Mississippi, in the city of Keokuk, and it appearing to be the settled law of that State that the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State, this court accepted the local law as that which was to govern the case. * * *

"We do not think it necessary to discuss this point further. In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie. * * *

"The reason for departing from the common law in cases of this kind is well and clearly stated by Judge Gresham in the case of State of Indiana *vs.* Milk, 11 Bissell, 197; 11 Fed. Rep., 389. He there says: 'Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or

confusion, and without serious injustice to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore-owners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when this rule is attempted to be applied to lakes and ponds practical difficulties are encountered. They have no current, and being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore-owners in the beds. Beaver lake is seven and a half miles east and west, and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. I do not think the mere proprietorship of the surrounding lands will, in all cases, give ownership to the beds of natural non-navigable lakes and ponds, regardless of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim.'

"We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: 'We think the common law might be improved, and we will, therefore, improve it.' As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms of flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends. But whatever mode of determining

the outgoing lines, as between adjoining owners, should be adopted in special cases, (which may be left for determination when they arise,) there can be no difficulty in the present case as between the plaintiff and the defendant. The latter is not an adjoining owner. The controversy here is between a riparian owner and a party claiming the land under water in front of him; and as between them, we think there is no question as to the riparian owner's right.

"The supreme court of Michigan in a recent case (Clute *vs.* Fisher, 65 Michigan, 48, since followed by Stoner *vs.* Rice, 121 Indiana, 51) held that the riparian owner of a fractional lot bounded by a non-navigable lake only takes so much of the lake bottom as is required to fill out the section or quarter section of which he owns the fraction; in other words, that his common-law right is limited by the sectional lines of the survey. It was conceded, however, that if the lake were so large that the lines of the granted sections would not embrace the whole lake bottom, then the riparian ownership would be extended to the center so as to include the whole bottom. In this case the sectional lines included all that was in dispute, the question being raised upon the cutting of the ice on the surface. In the other case (Stoner *vs.* Rice), the rule so adopted gave to the riparian owner the whole of the lake bottom as against a subsequent grantee of the Government; a result identical with that which would have been produced by the unmodified common-law rule. These decisions, however, are interesting because they are founded on the principle that the Government surveys form a system or network of lands in block, whose sectional and subsectional lines, whether actually surveyed on the land, or projected by the imagination through standing bodies of water, constitute lines of limitation which arrest and restrict any extension of a grant by implication beyond them. This is substantially the principle by which the Roman *agri limitati* were governed. These consisted, generally, of districts or territories acquired by conquest, and assigned and set apart for the benefit of veteran soldiers, when retired from active service in the army. The method of surveying such a territory was to draw lines towards the four quarters of the heavens, parallel and crosswise, in order to effect a uniform division of the lots, and to fix immutable boundaries between them. These boundaries, called *limites*, were marked

by a slip of land left for the purpose untouched by cultivation, as balks or highways. The squares of land contained either thirty-three or a hundred and thirty-three acres; that is, they were either ten or twenty *actus* square. Lands thus surveyed and appropriated were called limited lands—*agri limitati*—and when they bordered on streams or other waters they were not entitled, as other riparian lands were, to any accretion or alluvion, or to islands in the stream, but were strictly confined to the lines by which they were actually or theoretically limited. (See Dig. Lib. 41, tit. 1, frs. 7, 16; Lib. 43, tit. 12, fr. 1, sec. 6, 7; Gronovius, in note to Grotius, De Jure Bel. ac Pac., Lib. 2, cap. 3, sec. 16; Niebuhr's Hist. of Rome, vol. 2, App. 1.)

"This method of disposing of the subject might be convenient and attended with some advantages if it were sanctioned by the law; but we do not see any greater reason for adopting this departure from the common law than that followed in the case of State of Indiana *vs.* Milk, before referred to. * * *

"A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and, by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the right of the Government to survey and grant the lands under Wolf lake in 1874. Both Hardin and De Witt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the Government. It is contended that by this decision the question became *res judicata*, and that Hardin and De Witt and those claiming under them are bound thereby. It is very true that the decisions of the Land Department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of Davis *vs.* Weibbold, 139 U. S., 507, decided at the present term of this court, 'if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.' So that, if the lands had been 'previously disposed of,' the Department has no juris-

diction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the Executive Department, except for the purpose of governing its own conduct in the administration of its functions. The same principle is involved in Moore *vs.* Robbins, 96 U. S., 530, 533, 534, where it is said by Mr. Justice Miller, speaking for the court: 'With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the Government is the party injured, this is the proper course.' Again, referring to the power of the Secretary of the Interior after patent, it is said: 'He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the Government to annul his title.'

"On the whole, our conclusion is that the court below ought to have given judgment for the plaintiff, as against the defendant, to the center of Wolf lake, instead of to low-water mark, in front of the southeast fractional quarter of section 19, and in front of the northeast fractional quarter of section 30; and to the middle of the bay or projection of said lake in front of the east part of the southeast fractional quarter of said section 30."

In Mitchell *vs.* Smale, at page 412 of the opinion, the court said:

"Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of Hardin

vs. Jordan, and need not be repeated here. We think it a great hardship, and one not to be endured, for the Government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed, and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

"We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake or be guilty of a palpable fraud; in which case the Government would have the right to recall the sur-

vey, and have it corrected by the courts or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government. Nor do we mean to say that in granting lands bordering on a non-navigable lake or stream the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein this cannot be done.

"In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed, by the surveyor who made the survey in 1834–'5. It is apparent from the finding of facts that the lake in question is subject to considerable changes in the height and depth of the water therein. A *datum*, or bench-mark, is used in Cook county, Illinois (where the premises in question are situated), as a standard of comparison for the height of water in Lake Michigan. Of course the height of water in Wolf lake is affected by that of Lake Michigan, since they are connected by two different outlets. The finding of facts states that the level of water in the lake in question, when the Government survey was made in 1834–'5, was 2.2 feet above the *datum*, and four-tenths of a foot above the average level of Lake Michigan, which is 1.8 feet above *datum*. But it also states that Lake Michigan, at times, rises to five feet above *datum*, which would cause the lake in question to rise to a level of 2.8 feet (or nearly 3 feet) higher than it was when the Government survey was made. At such times, of course, very little of the said projecting tongue would be visible. But whether so or not, it would not alter the case. The existence of such projecting tongue is entirely consistent with the water or lake being the natural boundary of the plaintiff's land, which would include the said projection, if necessary, in order to reach the said boundary. It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary. (Citing authorities.)"

To both of these opinions Mr. Justice Brewer, Mr. Justice Gray, and Mr. Justice Brown dissented. The dissenting opinions, written by Mr. Justice Brewer, were based upon the proposition that the majority of the court had misinterpreted the law of Illinois as to the rights of riparian owners. But these dissenting opinions strengthen the opinions of the majority of the court in so far as the same are applicable to the case at bar. The dissenting opinions reaffirm the well-established doctrine that the determination of how far the title of a riparian owner extends is one of *local law*, and the decisions and the statutes of the State and of its highest court as to that question furnish the best and final authority. To the same effect are the cases of G. R. & I. R. Co. *vs.* Butler, 159 U. S., 87 (94), and Lowndes *vs.* Huntington, 153 U. S., 1 (19).

Let us, then, see what is the law of the State of Indiana respecting the rights of riparian owners where property borders inland lakes.

II.

INDIANA LAW.

It is the settled law in the State of Indiana that where an inland non-navigable lake covers a portion of a section of land and the Government survey designates the dry land in such subdivision as a fractional subdivision or lot, the purchaser from the Government of such lots acquires title to all that portion of the bed of the lake included in the whole subdivision. This has been repeatedly determined.

Stoner *vs.* Rice, 121 Ind., 51.

Brophy *vs.* Richeson, 137 Ind., 114.

Tolleston Club *vs.* State, 141 Ind., 197; S. C., 38 N. E., 214; 40 N. E., 690.

Tolleston Club *vs.* Clough, 146 Ind., 93; 43 N. E., 647.

Kean *vs.* Calumet Canal & Imp. Co., 150 Ind., 699.
Kean *vs.* Roby, 145 Ind., 221.
Kirwan *vs.* Murphy, 83 Fed., 275.
Forsyth *vs.* Smale, 7 Bissell, 201.

In the case of Stoner *vs.* Rice, 121 Ind., 51, the supreme court announced the law of that State upon this subject. The facts in that case being so similar to those in the case at bar, we quote from the opinion:

"The conclusion we have arrived at is that the owners of lands bordering on non-navigable inland lakes, such as the one described in this case, when the subdivisions of the land are surveyed by running a meander line between the dry land and the water to ascertain the number of acres of dry land, and designating such subdivision as a fractional quarter or a lot, giving the number of acres of dry land, takes the title to all the land contained within the subdivision, that is to say, he takes as a riparian owner and his title includes, and he owns, the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which his land is so situated. As in this case the N. W. ¼ of the N. E. ¼ is surveyed and designated as 'lot 1,' the purchaser of lot 1 acquires title to all the land situate within the boundary line of the said N. W. ¼ of the N. E. ¼ of said section, as the same is platted by the Government; and by the survey all the land situate in the N. ½ of the N. W. ¼ of said section was designated as 'lot 3,' and the purchaser of lot 3 acquired title to all the land in said N. ½ of said N. W. ¼ of said section, whether a part of it be covered with water and constitute a part of an inland lake, or part of it be swamp; and the same is true in regard to the S. ½ of the N. W. ¼ designated as 'lot 4.' The survey included all the land and when a portion of a subdivision is covered with water such portion was meandered to determine the amount of such dry land, and the meandered line does not constitute a boundary line.

"It is contended that the riparian owner bordering on a non-navigable lake, like a river, takes to the tread or center of the lake. This rule is impracticable when

applied to lakes. Suppose the lake to be round or nearly so, with riparian owners, as there would be on the north, south, east and west of it, this rule could not be applied; while the rule we have laid down is practicable, and we think a proper rule to be applied in cases of this character. To hold that the meandered line constitutes the boundary would be against the great weight of authority. Indeed, the authorities are almost unanimous against such a doctrine. The weight of recent authorities is to the effect that the owner of the bank owns to the center of the body of non-navigable water at least whether it be a lake or river, and that, if a lake gradually dry up, the owners of the banks become the owners of the bed, each to the center thereof. But we are unable to find a case parallel with the one under consideration, or where the doctrine has been applied to a lake like the one in question or to many of the lakes within this State. Where the body of water is a running stream, being a narrow rivulet at its bend, and growing larger and widening until it enters into another stream still larger or where it is a long, narrow body of water, there is no trouble in applying this doctrine; but when the body of water is surrounded by land and almost circular in form, covering a quarter or half section or more of land, with riparian owners on either side, we cannot say that the owners on the east and west would take to the exclusion of those on the north and south, nor *vice versa*, nor would it do, as it seems to us, to apply a doctrine that would require the running of diagonal lines between the various owners, each reaching to the center of the lake.

"*The true doctrine to apply in the disposition of such land as is covered by the body of such lakes, we think, is that the Government in making surveys included in such surveys all the land within the district surveyed, and if there was a lake or large pond which covered a part of a subdivision it was meandered out and the dry land in such subdivision designated as a fractional subdivision or lot; that in the purchase of such fractional subdivision or lot the purchaser took title to it as a riparian owner with the right to the land, as the water receded within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision though it was described as a fractional subdivision or lot. The authorized survey divided all the land within*

the district into subdivisions and if, by reason of water upon a tract of the land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as fractional subdivision or lot, and, although thus described the sale passed title to the whole subdivision." (The italics are ours.)

In Tolleston Club of Chicago *et al. vs.* State, 141 Ind., 197, the court said:

"This was an action for the recovery of certain overflowed lands along the Little Calumet river, in Lake county, and was brought against the appellants by the appellee, The State of Indiana. The land is claimed by the State under provisions of an act of Congress approved September 28, 1850, known as the 'swamp-land act.'

* * * * * * *

"This act has been interpreted in numerous decisions of the court, both State and Federal. After a very full examination of these decisions, this court, in the case of State *vs.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379, reached the following, among other conclusions: (1) That the act was a present grant to the several States of the swamp lands therein situated; (2) that whether or not any particular tract was or is swamp land within the terms of the grant was and is a question for the decision of the Secretary of the Interior; (3) that the decision of the Secretary is final, and cannot be overthrown by parol evidence; (4) that it is not necessary that this decision should be evidenced by a patent to the State, but it is sufficient that the lands have been selected as swamp lands, and such selection approved by the Secretary; (5) that when the selection has been so approved, and the particular tracts so identified as swamp lands, the title of the State relates back to the date of the grant, September 28, 1850. From the record it appears that the lands here in controversy were surveyed by the United States surveyors in 1834. On November 21, 1850, the Commissioner of the General Land Office issued instructions for determining what lands fell to the States under the swamp-land act. In these instructions it was said: 'This act clearly and unequivocally grants to the several States those lands which, from being swampy or subject to overflow, are unfit for cultivation.'

The registers of the local land offices were directed to 'make out lists of these lands as early as practicable' according to forms given, 'one copy of which,' they were told, 'you will transmit to the land officers and another to this office.' *The officers were further instructed that 'the only reliable data in your possession from which these lists can be made out are the (field) notes of the surveys on file in your office; and if the authorities of the State are willing to adopt these as the basis of their lists, you will so regard them.' As to the lands in this case, it was admitted by all the parties in open court 'that the State of Indiana, in accepting the swamp lands adopted the same lot numbers as were given in the survey of 1834 for lands bordering upon that impassable morass, and adopted the plats made by the United States surveyors as its plats of swamp lands.'* (Italics are ours.)

* * * * * *

"Doubts having arisen in several cases as to the regularity of the selections of swamp lands made in the several States under the act of September 28th, 1850, Congress, by an act approved March 3, 1857, declared: 'That the selection of swamp and overflowed lands, * * * heretofore made and reported to the Commissioner of the General Land Office, * * * be and the same are hereby confirmed and shall be approved and patented to the said several States.'

"It is contended by counsel for appellee that by this act of March 3, 1857, Congress fully confirmed the title of the State to the lands here in dispute, being those described in the list hereinbefore set out under certificate of the General Land Office, to wit, sections 12, 15, 17, 18, 19, 20, 21, 22, and N. W. ¼ 23, in township 36, range 8 W., and that the title of the State to said lands would have been complete on the passage of said act, even without the issuance of a patent therefor by the Secretary of the Interior, inasmuch as the title so confirmed by act of Congress could not fail by reason of any fault or neglect of duty on the part of the Secretary.

* * * * * *

"Further contention of counsel is that neither in the list nor in the patent is there a description of the lands which the State claims in this action. The lands claimed by the State are within the meander lines of the United States survey, on each side of the Little Calumet river, being a tract about

six miles in length, and from about three-quarters of a mile to about a mile and a quarter in width. In the original field-notes of the survey the region is referred to as a "lake," while on the plat it is marked 'Impassable marsh.' At the time of the United States survey in 1834 the territory was completely covered with water, in which, outside the river proper, there was a heavy growth of cat-tails, wild rice, and other swamp-like products; and there was evidence admitted on the trial without objection that it has been in about the same condition ever since. Duly certified copies of the field-notes and plat of the original survey, as well as of the list and description of the lands, as filed in the General Land Office were in evidence. Such description and plat as made by the surveyor general from the field-notes are conclusive, and the section lines and corners as laid down in the description and plat are binding upon a general government, and upon all other parties concerned. Doe *vs.* Hildreth, 2 Ind., 274.

"The United States surveyors marked all the section corners and also ran the north and south lines across the lake or marsh, marking the points of entrance into and exit from the marsh, and also the points on each bank of the river proper which flowed through the central part of the marsh.

"The sections were all numbered regularly as other sections of a United States survey. A part of each section lies without and a part within the meander line.

"*The sections are therefore as completely defined by corners, section lines, and numbers as any other sections of a United States survey. The whole territory in dispute, including the river itself, is covered by these sections. No land or water is left unsurveyed.*

"*All that is peculiar to the survey is that parts of the sections are without and parts within the meander lines; the parts without the meander lines being subdivided into lots, while the parts within are not marked as subdivided.* In the list certified from the General Land Office, as we have seen, the sections in question are described as 'All of 12, 15, 17, 18, 19, 20, 21, 22, and the N. W. ¼ 23.' There can be no doubt of the meaning of this description. It covers all of the sections named both within and without the meander lines.

"But counsel draw our attention to certain figures in red ink, placed before the number of each section in the list, as, '592, 12; 360.70, 15,' etc., and wish us to understand that

the list is to be read, 'All of 592 acres of section 12,' etc., being all of the land in each section outside the meanders. These red entries are evidently office figures and were undoubtedly placed in the list to indicate the acres of dry land in the several sections, being the land outside the meander lines. They do not, however, properly speaking constitute any part of the description of the sections. They simply indicate the dry land and were of use to the officials and to the purchasers of the land in determining the price that should be paid for it.

"As frequently decided, meander lines are not boundary lines, unless expressly made so in the instrument of conveyance. The full title of the grantor to the whole section or other division, named, both within and without the meander line, the wet land as well as the dry passes with the deed (Doe *vs.* Hildreth, *supra*; Ross *vs.* Faust, 54 Ind., 471; Ridgeway *vs.* Ludlow, 58 Ind., 248; Edwards *vs.* Ogle, 76 Ind., 302; Sphuny *vs.* Moore, 120 Ind., 352; 22 N. E., 319; Stoner *vs.* Rice, 121 Ind., 51; 22 N. E., 968; Brophy *vs.* Richeson, 137 Ind., 114; Railroad Co. *vs.* Schurmeier, 7 Wall., 272; Hardin *vs.* Jordan, 140 U. S., 371).

"We therefore conclude that the whole section, in each case, was fully described in the list except as to section 23, of which the northwest ¼ was described, and that the title to all of the land so described and listed was confirmed to the State by the act of 1857.

"What we have said as to the list applies also in great measure to the patent. The objection to the latter is that the sections are here described as fractional, and hence, that the patent does not convey the full sections, but only the parts without the meander lines. The term 'fractional' as applied to the sections named in the patent, refers simply to the circumstance that they do not contain 640 acres each of dry land. As we have seen, however, the sections were fully surveyed; the corners and boundary lines were determined and recorded in each instance. *It follows, from what we have already said, and from the authorities above cited, that the conveyance of the fractional sections carried title to the extreme boundary lines of the sections. All was conveyed.*

"There remained to the United States neither upland nor lowland, whether exposed to the surface or covered by the waters of the marsh or the river. The State took to the section lines.

"The issuance of the patent is still further evidence that the swamp lands named were selected by the State, and that such selection was approved by the proper authorities, although the title of the State, even without the patent, was already complete by virtue of the act of Congress (Edmondson *vs.* Corn, 62 Ind., 17; Hamilton *vs.* Shoaff, 99 Ind., 63; Matthews *vs.* Goodrich, 102 Ind., 557; 1 N. E., 175).

"The chief claim made by appellants to the lands in controversy is based upon a special act of Congress passed in 1870. This act is as follows: 'Whereas, there is lying along the Little Calumet river in the counties of Porter and Lake, in the State of Indiana, a body of land supposed to contain about four thousand acres, which has never been sold or surveyed and which was described in the original Government survey as impassable morass; and, whereas, the Calumet Drainage Company has been organized under the laws of said State for the purpose of draining the valley of said river including said morass therefore: *Be it enacted*,' etc., 'That said unsold lands shall be subject to a lien under the laws of the State of Indiana, for its proper portion of the cost of such drainage, and such lien may be enforced against said lands in the same manner and to the same extent as if the lands were owned by private persons. Provided that no claim shall be held to exist against the United States for such drainage. SEC. 2. *And be it further enacted*, That said lands may be surveyed (*a*) and sold (*b*) to the highest bidder, under the direction of the Secretary of the Interior, subject to said lien.'

"From what we have said as to the survey and title to the lands in controversy it is very clear that the United States had no claim or title to them at the time of the passage of this act. By the swamp-land act of September 28th, 1850, the title to the lands passed wholly to the State, and, so far as these lands are concerned, the act of 1870 is a nullity. It needs no argument to show that if the United States had parted with the title to the lands in 1850, it could not convey title to the same lands in 1870. This counsel for appellants concede and it is plainly the law (Reichert *vs.* Felps, 73 U. S., 160; Wright *vs.* Roseberry, 121 U. S., 488; 7 Sup. Ct., 985; Brophy *vs.* Richeson, *supra*).

"Appellants' claim, therefore, based upon the act of 1870 and mesne conveyances of lots into which the tract in dispute was divided by the resurvey of the land within the

meander lines of the survey of 1834, must fall to the ground The act of 1870, the resurvey and sale of lots pursuant to the terms of that act, and all deeds of conveyance made thereunder are equally void.

"However, it is not necessary that appellants should show any title in themselves in order to defeat the title claimed by the State. The State having brought this action for possession and to quiet its title to the lands, must prove that title good, and it is enough to defeat the claim of the State if the appellants can show that neither the State nor the appellants themselves, the present occupants of the land, are the owners thereof, but that the title is in third parties.

"This contention is earnestly made by appellants. They say that if the act of 1870 was void, and if the State acquired good title to the lands under the act of 1850, that title passed from the State when it conveyed the fractional sections along the meander lines, and that those parts of the several sections within the meanders are now owned by the holders of the corresponding parts of the same sections without the meanders.

"By the survey of 1834, as we have already seen the section corners of each of the sections in controversy were located. All boundary lines of the sections were also located, except that lying along the bed of the river, or over the deep water of the marsh or lake; but the ends of this line, the corresponding corners of the section, having been located, the line itself became thus determined, and might be drawn upon the plat.

Doe *vs.* Hildreth, *supra*, at p. 277.
Section 2396, R. S. U. S.

"The field-notes show that the whole territory now in dispute was covered with water. In these field-notes the locality is always referred to as the 'lake,' the 'river,' or the 'water,' and sometimes as 'river' or 'lake,' while the river proper is referred to as 'main channel' or 'the river water flowing through the lake.'

"The only meander lines run—the only ones that could be run on account of the water—were the meanders which include the territory now in question. The field-notes of the meander line on the west side are headed: 'Meanders

of Calumic river from post in west boundary (of township), thence up stream on right bank.'

"And for the meander line on the east side: 'Meanders of the Calumic river from post on E. boundary (of township), thence down stream on the left bank.'

"The meander lines thus described inclose all the lands here claimed by the State. The river or channel proper was not otherwise meandered, the intersection of its banks with the north and south section lines only being located.

"The territory within the meanders was then, and has continued to be ever since, covered with water during the greater part of the year. The field-notes state that the water was then from one to ten feet deep.

"The meander lines crossing the sections were not made boundary lines in the list of swamp lands certified from the General Land Office, nor in the patents given by the State when the fractional sections were sold. The sections as surveyed were conveyed to the State.

"The plat of the survey shows that the parts of the sections outside the meander were divided into 'lots' which were numbered separately from each section.

"The patents made by the State, in most instances show a conveyance of these 'lots' by their number and section.

"Indeed, it was admitted on the trial by all parties, in open court, 'that the State of Indiana, in excepting the swamp lands, adopted the same lot numbers as were given in the survey of 1834 for lands bordering upon that Impassable Morass, and adopted the plats made by the United States surveyors as its plats of swamp lands, and that the lands afterwards sold by the State of Indiana as swamp lands along and bordering this "Impassable Morass" were sold according to surveys and plats, which were exact copies of the survey and plats including numbers of lots, dimensions and acreage of same, as marked thereon made by the United States surveyors at the original survey of 1834.'

"If the State sold the sections by their numbers simply, as in the General Land Office list or as fractional sections, as in the patent from the United States, there would be little question that the entire sections were conveyed. Even if the parts within the meander were all sold, as some of them were, as quarter or quarter-quarter sections, or by some other exact subdivision, there would be as little doubt that the subdivision so named would be fully conveyed. This counsel

tacitly admit. But because the sales made by the State were in most cases made by lot numbers, it is argued that only the dry land outside the meander line was conveyed.

"As already said, a meander is not a boundary unless expressly made so. If the meander line in this case were actually or by necessary implication made a boundary of the lands sold, it is of course evident that such boundary would stand, just as any other boundary named or described. Such was the case in Edwards *vs.* Ogle, 76 Ind., 302; also in Brophy *vs.* Richesen, 137 Ind., 114, both already cited.

"But by the admission at the trial and from an examination from the State patents in the record it appears that the meander was not made a boundary line in the sales made by the State. On the contrary, the State, in making its sales, adopted the plats and lot numbers of the United States survey, with dimensions, acreage, and numbers all as made in the original survey of 1834.

"It seems very clear that whatever the State received from the United States she conveyed fully in her patents to the purchasers of the same lands, all described as in the survey upon which she bases her own claim to the lands.

"Section 20, for example, in this survey, was divided into four lots, numbered 1, 2, 3, and 4. If the land were sold as section 20, or as lots 1, 2, 3 or 4 of section 20, there could hardly be any doubt that the purchaser would acquire all that the State could convey within the four section lines. The principle, however, could not be different if one or two of the lots were sold separately. The lot lines, if extended to the opposite line of the section, would bound the purchase. The meander could have nothing to do with the matter, as that is used not as a boundary but to indicate the quantity of dry land, and to mark the limit where it was possible for the surveyors to work. All beyond was 'water,' 'lake,' 'river,' or 'impassable marsh.' It may be observed that the riparian doctrine, strictly speaking, does not apply here. In none of the conveyances was the land bounded by the river, by the lake, or by the morass, if there is such a thing as a meander of marsh or morass. No survey was made to or abutting on the river or its meander. The sections were surveyed in full, each one mile square containing 640 acres. The section or parts of sections sold, therefore, extend not to the morass or to the river but to the opposite section lines.

"Were the survey or any of the land bounded on the river,

the lake, or the morass, then undoubtedly the riparian doctrine would apply and the land described would extend to the thread of the Little Calumet or Calumic river. As it is, all the land is bounded by section lines.

"We are, therefore, of opinion that the State received good title to all the land in controversy by virtue of the act of Congress of 1850, and that the State, in selling this tract, conveyed to its grantees all the land so received in the respective sections, both within and without the meander lines. This conclusion, we are satisfied, is fully sustained by the authorities cited."

And on a rehearing in the same case the court, going a little more fully into the subject, said:

"With their petition for a rehearing of this case counsel for appellee here filed a very earnest and able brief, to which reply has been made by counsel for appellants. Other briefs have also been filed on both sides.

"Appellee's principal contention is that 'the court erred in holding that the swamp land in controversy had been surveyed either by the Government of the United States or by the State of Indiana at the time of the sale of such border lots' by the State.

"It seems to us that this is dangerous ground for appellee to stand upon.

"We think it was shown in the original opinion that the lands in question were surveyed by the United States Government in 1834. The several sections were surveyed and numbered by the deputy surveyors, and this is all that is required by law to be done in the field. The remaining work may be done in the office.

"By the third clause of section 2395, R. S. of the United States, it is provided that: 'The township shall be divided into sections containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles, and by taking a corner on each of such lines at the end of every mile. The sections shall be numbered respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six be completed.'

"For cases where boundary lines and corners have not been,

or could not be, actually run or fixed, provision is made in clause second of section 2396 of the same statutes, as follows:

"'The boundary lines actually run and marked in the surveys returned by the surveyor general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines as the case may be, to the water-course, Indiana boundary line, or other external boundary of such fractional township.'

"In connection with these statutes, it is said in Matthews' Guide to the Public Lands (page 114) that: 'The sections of one mile square are the smallest tracts, the outboundaries of which the law requires to be exactly surveyed. Their minor subdivisions, represented in lines drawn on the township plats, are not surveyed and marked in the field. They are defined by law, and the surveyors general, in protracting township plats from the field-notes of sections, merely designate them in red ink, the lines being imaginary, connecting opposite quarter-section corners in each section from south to north, and from east to west. * * * This convenient mode of subdividing sections with a view to economy and to facilitate sales of small tracts, although not actually marked on the ground by metes and bounds, yet, under laws of Congress, are susceptible of demarkation by any surveyor in the different States and Territories in accordance with the field-notes of the original survey made by the United States officers.'

"To make a legal survey in this case, therefore, it was only necessary to actually run the section lines every two miles, to mark a corner on each of such lines at the end of every mile, and to number the several sections. Even more than this was actually done by the surveyors in the field. The law then provides a means for ascertaining 'boundary lines which have not been actu-

ally run and marked,' namely, 'by running straight lines (on the plats in the Land Office) from the established corners to the opposite corresponding corners.' With these provisions of the law, with the two-mile parallel lines actually run, and the eighty-chain, or mile, corner points marked on each line, any surveyor, using the original field-notes, could have no trouble in locating the several lines, corners, and subdivisions. The land in controversy was, therefore, surveyed into sections, as provided by law, by the United States Government surveyors in 1834.

"But, even if we were mistaken in this, it would, as we have said, be a dangerous contention for appellee to undertake to show that such survey was not made.

"The swamp-land act of 1850, under which the States claim title, requires that the lands should be selected, and the selections approved by the Secretary of the Interior, as swamp lands. The land in dispute consists of parts of surveyed sections of land, selected, approved, and certified from the General Land Office of the United States. The land so selected is described as in 'township No. 36, range 8 west,' and being 'all of * * * (sections) 12, 15, 17, 18, 19 and 20. All of 21 and 22 (and) N. W. ¼ 23.'

"But, if there were in fact no survey, then no such sections would exist, at least between the meanders of the Calumet river; and so no selections would ever have been made by the State, or approved by the Secretary of the Interior. The consequence would be that the State had never received title, and the unsurveyed lands having remained in possession of the General Government, were correctly surveyed and sold under the act of Congress of 1870. If, therefore, we should admit this main contention of counsel for appellee, the consequence would inevitably follow that the State had never acquired title to the land in dispute. We are satisfied, however, that the conclusions reached in the original opinion, that the lands were surveyed in 1834; that they were selected and the selections approved under the swamp-land act of 1850; that the State therefore acquired good title under that act; and that the act of 1870, with the resurvey and sales thereunder, was a nullity, are all correct; and we are quite unable to understand why counsel should here insist upon a contention which if agreed to, would cut the ground entirely from under their own feet.

"The other principal contention of counsel for appellee

in this petition is that the meanders of the Calumet river are boundaries of the marginal lots in the several sections, as sold by the State. This cannot be admitted. It is contrary to all the authorities. Meanders are not boundary lines, unless expressly made so in the instruments of conveyance.

"In the present case, had the marginal lots along either side of the river been sold without reference to the sections, the purchasers would most certainly have taken title, not to the meanders simply, but to the thread of the stream. This, too, is according to the practice and instructions of the Land Department, to which counsel refers so confidently.

"Secretary of the Interior Vilas, February 27, 1888, on the petition of James Hemphill for the survey of a point of land or island extending beyond the meander line into Goose lake in Michigan, held (quoting from Railroad Co. *vs.* Schurmeir, 7 Wall., 286), that 'meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers (and as well upon inland lakes of water), not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser,' and hence that the application for a survey of the point of land beyond the meander should be denied: that is, in effect, that the title to the point of land in question was in the owner of the adjacent land within the meander line. See, also, decision of the Commissioner of the General Land Office of November 28th, 1884 (case of May, 3 Land Dec. Dep. Int. 200), and decision of Secretary Teller, July 11, 1883.

"In the latter—an Indiana—case (case of Richardson, 11 Copp's Land Owner, 284), it is said, 'The grants made by the Government of the lands lying on the lake are not limited by the meander line, but extend at least to the permanent waters of the lake.'

"In the case of Railroad Co. *vs.* Schurmeir, *supra*, it is said, further, by the Supreme Court of the United States, that: 'In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary. Proprietors bordering on streams not naviga-

ble, unless restricted by the terms of their grant, hold to the center of the stream.'

"The Schurmeir case has been the leading authority on this subject since the delivery of the opinion of the court.

"In the case of Forsythe *vs.* Smale, 7 Biss., 201, (Fed. Cas. No. 4950,) Judge Drummond, citing Railroad Co. *vs.* Schurmeir, *supra*, stated the rule in like manner as to meander lines, holding that 'in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream,' and that 'where land is purchased bordering upon a non-navigable stream, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land, the grant includes any land between the meander line and the water.' See, further, Gould on Waters, section 78 and notes; Angell on Water-courses, section 10, and following sections and notes.

"In Jones *vs.* Janney, 8 Watts & S., 436, 42 Am. Dec., 309, it was held that a 'conveyance of lands bordering on flats of rivers passes the flats as appurtenances, unless they are expressly excluded.' See also, Ashby *vs.* Eastern Railroad Co., 5 Metc. (Mass.), 368; 38 Am. Dec., 426.

"In Felder *vs.* Bonnett, 2 McMull. Law (S. C.) 44; 37 Am. Dec., 545, the court held that a survey calling for boundary designated as 'Dean swamp' includes land to flowing stream or current of swamp, where such exists, and does not extend merely to external lines of low and marshy ground.

"In Kraut *vs.* Crawford, 18 Iowa, 549; 87 Am. Dec., 414, the court held that a meander line is not a boundary line; citing Middleton *vs.* Pritchard, 3 Scam., 510; 38 Am. Dec., 112, 'Where it was decided that the riparian proprietor owned the low ground or peninsula outside the meander line.'

"Even, therefore, if the land had not been fully surveyed, and the section lines and corners were not all determined, as urged by counsel for appellee, and even if the survey terminated on the bank or edge of the morass on each side of the river, still the parties purchasing the lots abutting upon this morass or the meander line would take to the middle or thread of the stream. Nor can reservations be implied in case of conveyances of lands along streams. 'When, therefore, the Government has surveyed its lands along the bank of a stream, and has sold and conveyed such

lands by governmental subdivisions, its patent conveys the title to all islands between the meander line and the middle thread of the river, unless, previous to such patent, it has surveyed such islands as governmental subdivisions, or expressly reserved them, when not surveyed.' Butler *vs.* Railroad Co., 85 Mich., 246; 24 Am. St. Rep., 84, and cases there cited.

"Nor will it do, especially in view of the foregoing authorities, for counsel to say that the meanders in the case before us are not meanders of the river. The field-notes show that the whole territory between the meander lines was covered with water, while the evidence shows that it is still so covered. The river, so called, was the central or flowing part of this body of water. Meander lines, from their very nature, being intended to mark the sinuosities of a stream, are run as close to the water as can conveniently be done by the surveyors. In this case, as the field-notes show, the meanders could not be run any closer to the river than they were actually run. In addition to this, the field-notes actually named the lines as meanders of the river; the language used being 'meanders of Calumic river.'

"The meander is, therefore, merely a mark for the line of the river, being laid off as near to the river bank as the surveyors could work. It means the river, and is not itself a boundary, but only indicates the location of the true boundary, which is the river itself. If, therefore, we proceed on the theory of the appellee, we should still have to hold that the lands in controversy belong to the owners of the border lots on each side of the river.

"But as, in fact, the contention of the appellee that the land was not surveyed is not true, but the whole tract was surveyed into sections of land, and the border lots sold as lots of those sections, we held in the original opinion and still hold that the title of the purchasers of these border lots extended to the opposite lines of the sections. There was nothing else to limit them, the stream itself being included in the lines of the survey.

"*We may here remark that, so far as concerns the marginal lots, the Beaver Lake cases* (*State vs. Portsmouth Sav. Bank*, 106 *Ind.*, 435, 7 *N. E.*, 379, *and State vs. Milk*, 11 *Biss.*, 197, 11 *Fed.*, 389) *are not in point. Beaver lake was a large body of water of shallow depth, which had not been surveyed by the United States Government. Indeed, the cases themselves are au-*

thorities for the conclusions here reached. In The State vs. Milk it is said: 'That while a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge,' citing numerous authorities." (Italics are ours.)

We respectfully submit that these decisions of the supreme court of Indiana, involving the same general facts, if not indeed the title to these particular lakes in the beds of which plaintiffs in error now claim some rights, have conclusively determined adversely to the plaintiffs in error the claims which they are now urging.

This court in the *Hardin* case, and the supreme court of Indiana in the *Tolleston* case and in this case, have shown in a manner more clearly than is within our power the inapplicability of the decisions respecting Beaver lake to the case at bar.

III.

THE DECISION OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND OF THE SECRETARY OF THE INTERIOR RESPECTING THE SURVEY OF 1876 AND THE ISSUE OF PATENTS THEREUNDER IS NOT *res adjudicata*.

While it is true that a patent for land when issued by the Land Department, acting within the scope of its authority and delivered to and accepted bythe grantee, passes the legal title to the land, and while it is also true that when there is a question of contested rights between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, and that the decision of tbat Department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally, yet, it is equally true that when a patent has been awarded, delivered, and accepted, thenceforth all right to control the

title or to decide the right to the title has passed from the Land Office. Not only has it passed from the Land Office, but it has passed from the Executive Department of the Government.

Moore *vs.* Robbins, 96 U. S., 530.
Hardin *vs.* Jordan, 140 U. S., 371.
Mitchell *vs.* Smale, 140 U. S., 406.
Davis *vs.* Weibbold, 139 U. S., 507.

This court has also repeatedly decided that if lands patented or attempted to be patented were not at the time public property, *having been previously disposed of*, the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.

See cases above cited, and
Smelting Company *vs.* Kemp, 104 U. S., 640.
Wright *vs.* Roseberry, 121 U. S., 488.
Francœur *vs.* Newhouse, 40 Fed., 618.
Doolan *vs.* Carr, 125 U. S., 618.

We, therefore, say that the cases cited by plaintiffs in error upon the proposition that the decision of the Secretary of the Interior is *res adjudicata* are not in point.

IV.

LIMITATIONS.

Counsel's second point is that this action is barred by the statute of limitations.

This was a question of *fact*, which has been decided against plaintiffs in error both by the trial court and the supreme court of the State of Indiana. (See opinion of supreme court of Indiana above quoted.) If this court would go into the record to determine this question, its conclusion must necessarily, we submit, affirm that of the State courts.

But a jury having been waived, the case tried before the court, and not only the trial court, but the supreme court of Indiana, having decided against plaintiffs in error, this court will not review that question.

It is not a Federal question.

River Bridge Company *vs.* Kansas Pacific R'y Co., 92 U. S., 315.

Murdoch *vs.* City of Memphis, 87 U. S., 590.

In River Bridge Company *vs.* Kansas Pacific R'y Co., *supra*, Mr. Justice Miller said:

"This is a writ of error to the supreme court of the State of Kansas. The contest in the State court concerned the title to real estate, both parties claiming under grants from Congress made at different times. In the district court for the county of Shawnee, where the suit was originally brought, the parties submitted the case to the court without the intervention of a jury, and that court found a series of facts, fourteen in number, on which it declared the law to be for the defendant. This judgment was affirmed on error in the supreme court of the State, which decision the present writ of error brings before us.

"The finding by the district court was received by the supreme court of the State as conclusive as to all the facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress in a State court, any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined here.

"In chancery cases, or in any other class of cases, where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right to set up under the act of Congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a State court that it has in a case coming from a circuit court of the United States.

"This conclusiveness of the facts found extends to a finding by the State court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury (Boggs *vs.* Merced Mining Company, 3 Wall., 304.)"

Nothing further need be said on this point.

CONCLUSION.

Not only does the evidence in this case show, but this court and the supreme court of Indiana have *found it to be a fact*, that the beds of Wolf lake and Lake George were properly surveyed by the Federal Government in 1834–'35.

The United States, by patent, conveyed to the State of Indiana the lands in controversy, based upon that survey. In that conveyance the Government made no reservations as to the portions of the sections described in the conveyance which were then or are now in the bed of Wolf lake or of Lake George.

This court has held that after the aforesaid conveyance by the Federal Government to the State of Indiana no further title remained in the United States to be in any way disposed of, and that titles founded on the survey of 1876 are void.

It is admitted that the deed by the State of Indiana to the grantors of the defendant in error conveyed the same lands and used the same description as in the conveyance by the United States to said State.

It is the settled law of the State of Indiana that the purchasers of the fractional lots or sections from said State under the survey of 1834–'35 took all of the land in said subdivisions or lots to the limits thereof, and this, irrespective of whether the land was or was not covered by water, whether it was in the bed of a lake or a marsh.

This court having so repeatedly held that the decisions of the State courts are final as to how far the title of a

riparian owner extends, there is no new question here to be passed upon. We, therefore, respectfully submit that the judgment of the supreme court of Indiana should be in all things affirmed.

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